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SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-769

BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO

Petitioner,

v.

MARY JO FOX,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent Mary Jo Fox opposes the granting of certiorari in this case for the reasons set out below.

QUESTION PRESENTED

In respondent's view, the question presented is whether the State of New Mexico has jurisdiction to tax the income of a non-Navajo Indian residing and working in Navajo Indian country.

STATUTES INVOLVED

In McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), this Court relied on several Acts of Congress as well as the Navajo Treaty of 1868, and respondent contends these statutes to have equal application to this case. These statutes are the Arizona and New Mexico Enabling Acts, 36 Stat. 557 (1910);*/ Public Law 83-280, as amended, 25 U.S.C. §§ 1321-1326; and the Buck Act, 4 U.S.C. §§ 105-110. Of additional importance to this case is a regulation of the Interior Department, 25 C.F.R. § 11.2(c), which is set out as an appendix to this brief.

STATEMENT OF THE CASE

Petitioner's statement is accurate but includes many facts irrelevant to

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*/ The Arizona Enabling Act involved in McClanahan is identical to New Mexico's and the two were promulgated together by Congress; see the reference cited.

the legal issue presented by the petition. In respondent's view, the only relevant facts are that she belongs to an American Indian Tribe and at the times in question resided and worked within the boundaries of the Navajo Indian Reservation.

REASONS FOR DENYING THE WRIT

Respondent agrees that many questions as to the jurisdictional status of Indians are of great national importance and that the instant case is very important to her and other Indians similarly situated. However, the particular question presented here is not of great national importance. The number of Indians residing on reservations owned by other tribes is a very small percentage of the reservation Indian population of the United States.

A second reason to deny the writ is

that the court below was correct in its decision.

Since the first Indian Intercourse Act of 1790, 1 Stat. 137, Congress has repeatedly legislated with respect to "Indians", thus requiring the courts to define that term, often with jurisdictional consequences. The courts, state and federal, have consistently defined the term to include all Indians without differentiation according to tribal membership. Indeed, the very concept of formal, written enrollment in an Indian tribe is an alien one imposed on the tribes long after the basic principles of Indian law were established by Congress and this Court.

Several decisions of this Court have application to the problem; all support the decision of the court below. United States v. Rogers, 45 U.S. (4 How.) 567,

572-3 (1846); United States v. Kagama, 118 U.S. 375, 383 (1885); United States v. Thomas, 151 U.S. 577, 585 (1894); Westmoreland v. United States, 155 U.S. 545 (1895); United States v. McGowan, 302 U.S. 535 (1938).

Lower federal court and state court decisions are consistent. Several of the more important cases are cited by the court below. In addition see Ex parte Pero, 99 F.2d 28 (7th Cir. 1938); United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974); Davis v. United States, 32 F.2d 860 (9th Cir. 1929).

Administrative practices of the Bureau of Indian Affairs (BIA) are also consistent with the decision below. In 1935, the BIA promulgated basic law and order regulations now codified as 25 C.F.R. part 11. These regulations are to serve Indian reservations whose tribal

legal machinery is inadequate. They were in effect on the Navajo Reservation from 1935 until 1959, when tribal law supplanted them pursuant to 25 C.F.R. § 11.1(e). The section relevant to this case is 25 C.F.R. § 11.2(c), which defines the scope of federal authority on an Indian reservation to include members of tribes other than those owning the reservation.

Furthermore, as the court below noted, BIA benefits are furnished to all Indians on reservations without regard to tribal membership. Petition for Certiorari, pages A4-A5.

The Navajo Treaty of 1868, 15 Stat. 667, also supports the decision below, since the Treaty established the Reservation for "the Navajo Tribe of Indians, and for such other friendly tribes or individual Indians as from time to time

they may be willing, with the consent of the United States, to admit among them; . . ." Treaty Article II. Petitioner's contention that formal action of the Navajo Tribe is needed to invoke this provision is questionable, since there was no unified Navajo tribal government in 1868; the tribe was then a group of independent bands imprisoned by the United States at the Bosque Redondo. The Navajo tribal government dates only from the 1920's. L. Kelly, The Navajo Tribe and Federal Indian Policy 1900-1935 (U. Ariz. Press 1968). But in any event, the Navajo Tribe today does assert its governmental authority over all Indians on the reservation. 7 Nav.Tr.C. § 133; 17 Nav.Tr.C. passim.

The dissenting opinion below and petitioner in this Court appear to urge a personal approach to jurisdiction. It

is suggested that the decision on state jurisdiction should depend on such individualized facts as whether respondent is culturally assimilated into Anglo-American society, who her employer is, and who her husband is. Such an approach is manifestly impractical (cf., Seymour v. Superintendent, 368 U.S. 351, 358 (1962)); but in any event, the Indian jurisdiction is clearly territorial, not personal. United States v. Burland, 441 F.2d 1199 (9th Cir. 1971), cert. denied, 404 U.S. 842; compare McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) with Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The basic federal statute defining Indian country, 18 U.S.C. § 1151, describes a territory. While this statute applies directly to criminal jurisdiction, this Court has recently interpreted it to apply to other

jurisdictional relationships as well. DeCoteau v. District County Court, 420 U.S. 425, fn.2 (1975).

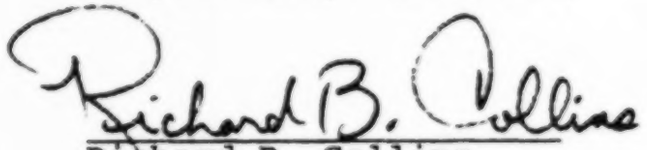
Location within Indian country territory has jurisdictional consequences for non-Indians as well as Indians. Williams v. United States, 327 U.S. 711 (1946). But for many purposes, non-Indians in Indian country have been treated differently from Indians. Compare McClanahan v. Arizona Tax Comm'n, supra, with Kahn v. Arizona Tax Comm'n, 16 Ariz. App. 17, 490 P.2d 846, appeal dismissed, 411 U.S. 941. As the authorities discussed earlier make clear, this distinction in law has consistently been between non-Indians and all Indians regardless of tribe, for which reason the decision below was correct.

CONCLUSION

For the reasons stated, this Court should deny the petition for certiorari.

January , 1976.

Respectfully submitted,



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APPENDIX

25 C.F.R. § 11.2(c) For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, . . .